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Supreme Court, U.S.
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No. 10-271

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID GEORGE CHANDLER,

Petitioner

v.

SHARON BLACKETTER,

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the
Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DAVID GEORGE CHANDLER, Petitioner, v. SHARON BLACKETTER, Respondent.	CV. 06-1777-PK FINDINGS AND RECOMMENDATIONS

PAPAK, Magistrate Judge:

INTRODUCTION

Petitioner brings this habeas corpus action pursuant to 28 U.S.C. § 2254 in which he challenges his underlying state convictions for Rape in the Second Degree, Sodomy in the Second Degree, Furnishing Alcohol to a Person under 21 Years of Age, and Endangering the Welfare of a Minor. For the reasons set forth below, the Petition for Writ of Habeas Corpus (#1) and Alternative Request for Evidentiary Hearing (#21) should be denied, and judgment should be entered dismissing this action with prejudice.

STATEMENT OF FACTS

On October 10, 2001, a Clackamas County grand jury indicted petitioner on one count of Rape in the Second Degree, two counts of Sodomy in the Second Degree, one count of Furnishing Alcohol to a Person under 21 Years of Age, and one count of Endangering the Welfare of a Minor. R.E. 108 at ER 1-3.[1] Petitioner pleaded not guilty. The court first appointed Mr. Slininger to represent the petitioner, but petitioner then retained Mr. Shepley as counsel. R.E. 103 at 4. On May 7, 2002, however, the court granted Mr. Shepley's motion to withdraw as counsel. R.E. 102 at 2.

The district attorney then filed a new information including allegations of solicitation to commit perjury and solicitation to commit tampering with a witness. R.E. 102 at 5. On May 9, 2002, the court appointed a private attorney, Mr. Haines, for the limited purpose of representing the petitioner during arraignment on these new allegations. *Id.* at 6.

The court next appointed Mr. Woram as petitioner's counsel. R.E. 104 at 3. After the petitioner sent a letter to the court requesting a new attorney, Mr. Woram attempted to visit the petitioner in jail, but the petitioner refused to see him. *Id.* On June 14, 2002, the court held a hearing on the petitioner's request for substitute counsel. At the hearing the petitioner explained that Mr. Woram refused to do what the

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[1] Citation "R.E." refers to Respondent's Exhibit.

petitioner asked, lied to him and was "rude, arrogant, and condescending," and that the petitioner would no longer cooperate with Mr. Woram as counsel. *Id.* The prosecutor, Ms. Landers, objected to Mr. Woram's withdrawal, asserting that the petitioner had been arraigned nine months earlier and that the victim was becoming less cooperative over time. *Id.* at 4-5. Ms. Landers explained that she had received a letter from the petitioner in which he stated that he did not trust attorneys and was capable of speaking for himself. *Id.* at 5. Ms. Landers asserted petitioner's letter made "it perfectly clear that he will drag this on in any way that he can." *Id.* at 5. The court declined to appoint new counsel, voicing concern that the petitioner would "do the very same thing with that lawyer." *Id.* at 7. Instead, the court offered the petitioner the options of waiving the right to counsel and retaining Mr. Woram as a legal advisor, or keeping Mr. Woram. *Id.* The petitioner elected to continue with Mr. Woram as his attorney. *Id.*

Less than two weeks after the hearing on petitioner's request for new counsel, Mr. Woram moved the court to withdraw because he believed that he could not ethically continue as the petitioner's attorney. R.E. 105 at 5. Ms. Landers objected, arguing that this was "yet another attempt by the defendant to manipulate the criminal justice system by continuing to delay this case." *Id.* at 4. Ms. Landers further asserted that the petitioner's previously discussed letter to her "intentionally threatened that if he didn't get a plea

offer that he liked that he would drag this case out indefinitely and knew how to do it." *Id.* The court permitted Mr. Woram to withdraw and appointed Mr. Watson as counsel. *Id.* at 5.

Approximately one month after his appointment as counsel, Mr. Watson, like Mr. Shepley and Mr. Woram before him, moved to withdraw. R.E. 106 at 6. The petitioner told the court that "the feeling is mutual." *Id.* at 7. The court warned the petitioner that "this is the end of the line with regard to changing attorneys." *Id.* The court clarified that "if you're not able to get along with your next lawyer, you're going to be in here trying this case by yourself." *Id.* at 8. The petitioner said that he understood the court's decision. *Id.* The court later reiterated that this would be the petitioner's "last opportunity to change attorneys" and that if the petitioner was "not able to agree with his new attorney" he would be proceed to trial without an attorney. *Id.* at 10. The court set a new trial date of November 5, 2002. Subsequently, a judge temporarily covering for the assigned judge appointed Mr. Bernstein to represent the petitioner. The temporary judge granted Mr. Bernstein's request for a continuance and set December 17, 2002 as the trial date. R.E. 106 at 19. On November 22, 2002, however, Mr. Bernstein moved to withdraw as counsel based on a letter that the petitioner sent to the temporary judge concerning a motion in his case as well as a conversation between the petitioner and Mr. Bernstein. *Id.* at 108. At the hearing on the motion, the petitioner explained that Mr. Bernstein did an incompetent job at a hearing, that he then criticized

Mr. Bernstein for a poor performance, and that Mr. Bernstein reacted by quitting. *Id.* at 109. The petitioner explained that he had not asked Mr. Bernstein to quit, that he merely criticized Mr. Bernstein, and that he had no intention of "this happening." *Id.* at 110-11. When the court indicated it would deny Mr. Bernstein's motion to withdraw, Mr. Bernstein stated that he would not and could not continue to represent the petitioner, regardless of whether the court appointed another attorney. *Id.* at 111. The court delayed its decision and took Mr. Bernstein's motion to withdraw under advisement. *Id.*

The court resumed the hearing on Mr. Bernstein's motion to withdraw three days later. R.E. 106 at 114. Before the hearing, the court met with another attorney, Ms. Cooke, about her availability to represent the petitioner. *Id.* Ms. Cooke was apparently unavailable to act as the petitioner's attorney for the December 17, 2002 trial date. *Id.* at 131. Also before the hearing, Mr. Bernstein presented the court with a copy of a new letter that he had received from the petitioner. The letter contained obscene language and insulted Mr. Bernstein's ethnicity, criticized Mr. Bernstein's reputation, and encouraged Mr. Bernstein to find another career.[2] *Id.* at 119.

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[2] The letter read: "Fuck you, you cock-sucking kike dump truck. You mother-fucking court-appointed public pretenders refuse to do the job you're assigned to do and then bail out when you're criticized for not doing it competently. Do the world a favor and find another career. Eat shit and die," two double lines, and then the words, "'stick this in my file."

The court allowed Mr. Bernstein to withdraw. R.E. 106 at 115. After reviewing petitioner's history with his previous attorneys, the court stated that "having read that letter, I decided it was fruitless to try and appoint another attorney to represent you." *Id.* at 119. The court, however, indicated that it would try to get an attorney to act as a legal advisor for the petitioner. *Id.* The petitioner resisted the court's decision, explaining that he was perfectly happy to work with Mr. Bernstein and that he did not intend for Mr. Bernstein to withdraw. *Id.* at 121, 124. The petitioner also said that he wrote the letter to Mr. Bernstein when he was very upset, just after receiving notification that Mr. Bernstein was moving to withdraw as his attorney. *Id.* at 120-21,124.

The petitioner then reviewed his relationships with his previous attorneys. He explained that his conflict with Mr. Shepley stemmed from his desire to take the stand contrary to Mr. Shepley's advice. R.E. 106 at 121. Petitioner also explained that he sought to replace Mr. Woram because Mr. Woram refused to set a bail reduction hearing, refused to answer several of his questions, and acted as if his case "was an entire burden." *Id.* at 122. Petitioner next explained that Mr. Watson did not look petitioner in the eye or introduce himself and threw his business card at the petitioner. *Id.* Finally, the petitioner requested that the court appoint Ms. Cooke and stated that he would "bend over backwards to do anything it took to make sure that this does not happen again." *Id.* at 122-23. The petitioner asserted that he was "in no way competent" to represent himself and would be convicted if forced to represent himself at

trial. *Id.* at 123. The prosecutor meanwhile contended that the petitioner's request for new counsel and a continuance was merely a part of petitioner's acknowledged plan to delay the case. *Id.* at 126.

The court observed that the case was 410 days old and that Oregon Supreme Court guidelines indicate that such felonies should be tried within 90 days. R.E. 106 at 126. The court also noted petitioner's threat to the prosecutor to delay the case indefinitely. *Id.* at 132. The court then denied petitioner's motion to continue, but agreed to search for a legal advisor for the petitioner. *Id.*

Nearly two weeks later, the court offered to appoint Mr. Dunn as a legal advisor for the petitioner if the petitioner agreed to move the trial date to December 12, 2002. R.E. 106 at 134. The petitioner refused to permit the court to reschedule the trial date and stated, "[a]s far as I'm concerned, I'm not representing myself so I don't need a legal advisor." *Id.* at 136. The petitioner refused to speak to Mr. Dunn and said that the court was trying to bait him into accepting a legal advisor. *Id.* at 137.

On December 17, 2002, the day of trial, Ms. Cooke appeared on the petitioner's behalf to move for appointment of counsel. R.E. 106 at 141. Ms. Cooke argued that nothing in the record suggested that the petitioner failed to cooperate with Mr. Shepley. *Id.* Ms. Cooke also argued that nothing suggested that the petitioner was at fault in causing Mr. Woram to

withdraw. *Id.* at 141-42. Ms. Cooke further contended that there was nothing in Mr. Watson's motion to withdraw permitting an interference that the petitioner was at fault. Ms. Cooke also noted that the petitioner's letter to Mr. Bernstein was privileged, and that Mr. Bernstein's decision to give the letter to the judge was self-serving and a violation of Mr. Bernstein's ethical obligations. *Id.* at 144. In conclusion, Ms. Cooke asserted that the petitioner was entitled to court-appointed counsel under the State of Oregon and the United States Constitutions. *Id.* at 147-48. The court refused to appoint counsel. The court noted that the petitioner had a "calculated purpose in delaying this [case] indefinitely." R.E. 106 at 148. The court also stated that Oregon state case law suggested that the right to counsel does not require a court to repeatedly give a defendant an additional court-appointed attorney. *Id.* Further, the court emphasized that the petitioner understood that the attorney appointed after Mr. Watson would be his last court-appointed attorney. *Id.*

During trial, the petitioner stated that he was incapable of making an opening statement and that he wished to be represented by counsel. R.E. 106 at 170. The court instructed the jury, however, that the petitioner had waived his right to court-appointed counsel. *Id.* The petitioner was convicted of all counts. *Id.* at 310-11. The petitioner then appeared without counsel at sentencing, and the court sentenced him to three consecutive terms of 75 months each, for a total of 225 months. R.E. 101, R.E. 106 at 322.

Petitioner appealed his conviction, assigning error to the trial court's refusal to grant defendant's request for continuance; refusal to appoint counsel for the trial; and failure to appoint counsel for sentencing. R.E. 108 at 15, 21. The Oregon Court of Appeal affirmed without opinion and the Oregon Supreme Court denied a petition for review. *State v. Chandler*, 205 Or. App. 568 (2006); *State v. Chandler*, 341 Or. 245 (2006). On December 12, 2006, petitioner filed his petition for writ of habeas corpus (#1) in this Court.

LEGAL STANDARDS

A habeas petitioner is not entitled to relief in federal court unless he demonstrates that the state court's adjudication of his claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Section 2254(d)(1) establishes a two-part test to determine whether a habeas petitioner is entitled to relief. *Sarausad v. Porter*, 479 F.3d 671, 676 (9th Cir. 2007). First, the petitioner must show that there is clearly established Supreme Court precedent. *Id.* (*citing Williams v. Taylor*, 529 U.S. 362, 381 (2000)). Second, the petitioner must show that the state court decision was either "contrary to" or an "unreasonable application" of that precedent. *Id.* (*citing Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*)). A state court's findings of fact are presumed correct and the petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Thus, federal courts apply a "highly deferential standard for evaluating state-court rulings." *Sarausad*, 479 F.3d at 676 (internal citations omitted). The federal court reviews the last reasoned decision by the state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Franklin v. Johnson*, 290 F.3d 1223, 1233 n. 3 (9th Cir. 2002). The decisions of the state trial court that occurred between May 2, 2002, and March 3, 2003 are the bases for review in the instant proceeding, since the Oregon Court of Appeal affirmed without opinion and the Oregon Supreme Court denied a petition for review.

I. Clearly Established Federal Law

"Clearly established" as used in § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the

relevant state-court decision." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (*citing Williams*, 529 at 412). In other words, "'clearly established Federal law' is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir. 2004) (*citing Lockyer*, 538 U.S. at 72). Although other federal court decisions do not themselves constitute "clearly established Federal law," they may assist in determining what law is "clearly established," or clarify whether a state court's decision is contrary to, or an unreasonable application of, existing Supreme Court precedent. *See, e.g., Robinson v. Ignacio*, 360 F.3d 1044, 1057 (9th Cir. 2004) ("when faced with a novel situation we may turn to our own precedent, as well as the decisions of other federal courts, in order to determine whether the state decision violates the general principles enunciated by the Supreme Court and is thus contrary to clearly established federal law"); *Lewis v. Mayle*, 391 F.3d 989, 995 (9th Cir. 2004) ("we still look to our own law for its persuasive authority in applying Supreme Court law") (internal quotations omitted); *Luna v. Cambra*, 306 F.3d 954, 960 (9th Cir. 2002), amended, 311 F.3d 928 (9th Cir. 2002).

II. Contrary To Federal Law

The terms "contrary to" and "unreasonable application" have independent meanings. *Sarausad v. Porter*, 479 F.3d 671, 676 (9th Cir. 2007). A state court decision is "contrary to" clearly established federal law if it is "in conflict with", "opposite to" or "diametrically

different from" Supreme Court precedent. *Williams*, 529 U.S. at 388. A state-court decision may be contrary to Supreme Court precedent in two ways: (1) if the state court "arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law"; or (2) "decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Sarausad*, 479 F.3d at 676 (*citing Williams*, 529 U.S. at 413). The Ninth Circuit has clarified the first prong of this "contrary to" test, stating that a decision may be contrary to clearly established federal law if it "fails to apply the correct controlling authority." *Clark v. Murphy*, 331 F.3d 1062, 1067 (9th Cir. 2003) (*citing Williams*, 529 U.S. at 413-14). By contrast, "a run-of-the-mill state-court decision applying the correct legal rule from [Supreme Court] cases to the facts of a prisoner's case" in a distinguishable factual context is not "contrary to" clearly established Supreme Court precedent. *Williams*, 529 U.S. at 406 (O'Conner, J., concurring).

III. Unreasonable Application of Federal Law

An "unreasonable application" of clearly established Supreme Court law occurs when "the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the . . . case." *Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir. 2004) (*citing Williams*, 529 U.S. at 413). "[A] federal habeas court making an 'unreasonable application' inquiry should ask whether the state court's application of federal law was objectively unreaonsable."

Sarausad, 479 F.3d at 676-77 (*citing Williams*, 529 U.S. at 409).

State court decisions are objectively unreasonable when they improperly interpret or apply the relevant legal rule. *See Williams*, 529 U.S. at 397 (decision unreasonable if state court mischaracterized the legal rule, failed to evaluate the totality of available evidence, or relied on an inapplicable exception). On the other hand, the Supreme Court has declined to find objective unreasonableness by state courts in various situations. *See, e.g., Rice v. Collins*, 546 U.S. 333, 341-342 (2006) (when reasonable minds considering the record might disagree on court's credibility determination); *Yarborough v. Alvarado*, 541 U.S. 652, 665 (2004) (when the state court's test application of law "fits within the matrix" of prior Supreme Court decision); *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (state court's affirmance of petitioner's sentence reasonable when Supreme Court precedents on sentencing proportionality lack clarity and grant legislatures broad discretion to fashion sentences); *Penry v. Johnson*, 532 U.S. 782, 795 (2001) (when Supreme Court holding establishing the rule was limited to the "distinct circumstances" presented there).

DISCUSSION

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *U.S. Const. amend VI*. "The plain wording of this [Sixth

Amendment] guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful 'defence.'" *United States v. Wade*, 388 U.S. 218, 225 (1967). Thus, the right to counsel attaches at all critical stages in the criminal justice process. *See, e.g., Maine v. Moulton*, 474 U.S. 159, 170 (1985). Critical stages of the criminal process include both trial and sentencing. *See Gardner v. Florida*, 430 U.S. 349, 358 (1997). The Supreme Court holds that the right to counsel is "fundamental," *Gideon v. Wainwright*, 372 U.S. 335 (1963), and does not depend on a request by the defendant. *Carnley v. Cochran*, 369 U.S. 506, 513 (1962) ("where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request").

The state court's decision in this case implicates three separate doctrines related to a defendant's Sixth Amendment right to the assistance of counsel: waiver of the right to counsel, forfeiture of the right to counsel, and requests for continuances to secure counsel.

I. Waiver of the Right to Counsel

A. Supreme Court Precedent at the Time of the Relevant State Court Decision

A person accused of crime may choose to forgo representation by waiving the right to counsel. *Faretta v. California*, 422 U.S. 806 (1975). A waiver is an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464

(1938). The Supreme Court holds that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson*, 304 U.S. at 464. Thus, the Constitution requires that a waiver of the right to counsel be knowing and intelligent. *See id.*

In *Faretta*, the Supreme Court held that a defendant's waiver of counsel is valid whenever the defendant is "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with his eyes open.'" *Faretta*, 422 U.S. at 835 (*quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). These "dangers and disadvantages of self-representation" include the fact that "counsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of voir dire, examine and cross-examine witnesses effectively . . . , object to improper prosecution questions, and much more." *Patterson v. Illinois*, 487 U.S. 285, 299, n.13 (1988).

In *Iowa v. Tovar*, 541 U.S. 77 (2004), the Supreme Court clarified the types of warnings required before a valid waiver, holding that in the context of a guilty plea, a defendant constitutionally waives the right to counsel when the trial court informs him of the charges against him, his right to be counseled regarding his plea, and the range of allowable punishments attendant upon the entry of that plea. *Id.* at 81. Note, however, that the last

reasoned decision of the state court in this case occurred before the Supreme Court's ruling in *Tovar*. Thus, this Court acknowledges the differences between *Faretta* and *Tovar*, yet necessarily analyzes the state court's decision only against contemporaneous Supreme Court precedent from *Faretta*.

B. Federal Circuit Courts' Interpretation of Supreme Court Precedent

The Ninth Circuit holds that in order for a defendant to make a valid *Faretta* waiver of the right to counsel, "the district court must insure that the defendant understands 1) the nature of the charges against him, 2) the possible penalties, and 3) the 'dangers and disadvantages of self-representation.'"[3] *United*

[3] Despite this concise exposition of the Ninth Circuit's waiver standard in Erskine, Ninth Circuit jurisprudence does not uniformly describe the requirements for a valid *Faretta* waiver. On one hand, *Balough* and its progeny establish that trial courts must inform defendants of three elements (charges, penalties, and "dangers and disadvantages") to ensure valid waivers of the right to counsel. *See Balough*, 820 F.2d at 1487; *Erskine*, 355 F.3d at 1167. On the other hand, two Ninth Circuit cases specifically addressing waivers of the right to counsel through conduct discuss only the third *Balough* element of "dangers and disadvantages" of representation. *See United States v. Kelm*, 827 F.2d 1319, 1332 (9th Cir. 1987) (finding a valid waiver when the record showed that the defendant was aware of the "dangers and disadvantages" of self-representation); *United States v. Meeks*, 987 F.2d 575, 579 (9th Cir. 1993) (distinguished itself from *Kelm* and noting that the defendant did not waive his right to counsel in part because the record did not show that the defendant was "aware of the dangers of proceeding pro se").

Additionally, not all circuits agree with the Ninth Circuit in requiring the trial court to inform a defendant of the charges,

States v. Erskine, 355 F.3d 1161, 1167 (9th Cir. 2003) (*citing United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987)). The preferred procedure requires the trial court to discuss each of these three elements with the defendant in open court. *Balough*, 820 F.2d at 1488. This procedure, however, is not mandated. *See Lopez v. Thompson*, 202 F.3d 1110, 1117 (9th Cir. 2000) ("consistent with our authority, we have suggested, but not mandated, a preferred procedure for federal district courts to follow").

"In rare instances, however, 'absent such a colloquy, a knowing and intelligent waiver will [nonetheless] be found.'" *Savage v. Estelle*, 924 F.2d 1459, 1466 (9th Cir. 1990) (*quoting United States v. Rylander*, 714 F.2d 996, 1005 (9th Cir. 1983)); *see Balough*, 820 F.2d at 1488 ("We have also held that a

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penalties, and risks of self representation before finding a valid *Faretta* waiver. *See, e.g., United States v. Evans*, 478 F.3d 1332, 1340 (11th Cir. 2007) (right to counsel at sentencing validly waived where court adequately warned defendant of dangers of self-representation); *Moore v. United States*, 178 F.3d 994, 998 (8th Cir. 1999) (extensive colloquy explaining dangers and disadvantages of self-representation deemed sufficient for knowing and intelligent waiver of the right to counsel); *United States v. Schmidt*, 105 F.3d 82, 87 (2d Cir. 1996) (waiver of right to counsel is knowing and intelligent when the court points out the disadvantages of proceeding without counsel, and the defendant has the ability to understand the nature of the proceedings against her); *but see United States v. Frechette*, 456 F.3d 1, 12-14 (1st Cir. 2006) (waiver upon guilty plea deemed knowing and intelligent where court informed accused of nature of charges, of his right to counsel, and of the range of punishments attendant upon entry of the plea).

limited exception may exist whereby a district court's failure to discuss each of the elements in open court will not necessitate automatic reversal when the record as a whole reveals a knowing and intelligent waiver."). In those instances, the court's inquiry into whether a defendant validly waived the right to counsel focuses on what the defendant understood, rather than on what the court said or understood. *See Balough*, 820 F.2d at 1487 88.

Similarly, the Ninth Circuit recognizes that a waiver of the right to counsel may still be valid despite defective instructions from the trial court concerning the risks of self-representation. *See Cordova v. Baca*, 346 F.3d 924, 926-27 (9th Cir. 2003) ("[b]ecause the Supreme Court has not spoken to the consequences of a trial court's failure to give proper *Faretta* warnings, a state court would be entitled to conclude that a defective waiver colloquy does not automatically result in a defective waiver--that a defendant's waiver was nonetheless knowing and voluntary, perhaps because defendant was well versed in the criminal justice process"); *Monterrosa v. Belleque*, No. 05-1233 MO, 2008 U.S. Dist. LEXIS 2172 , at *19 (D. Or. Jan. 8, 2008) (*citing Cordova*, 346 F.3d at 926 27 and holding that a post-conviction relief court did not unreasonably apply Supreme Court precedent when determining that a defendant was well-aware of the risks of self-representation even though the state court's colloquy failed to specifically warn the defendant of those risks); accord *Swiger v. Bronon*, 86 Fed. Appx. 877, 881 (6th Cir. 2004) ("*Faretta* does not clearly establish that formal

warnings by the trial court are required to establish a knowing, voluntary and intelligent waiver of the right to counsel").

Ninth Circuit cases applying the general principles articulated by the Supreme Court in *Faretta* also illustrate that defendants may choose to waive the right to counsel merely by manipulating the attorney appointment process, so long as they are also aware of the risks of self-representation. *See United States v. Sutcliffe*, 505 F.3d 944, 955-956 (9th Cir. 2007) (defendant's manipulation of his relationships with five successive appointed lawyers through threats, lawsuit, refusal to cooperate, rudeness and hostility constituted a waiver of the right to counsel, when defendant was forewarned that he risked waiving his right to counsel and informed of dangers of self-representation, his charges, and potential penalties); *United States v. Kelm*, 827 F.2d 1319, 1331-32 (9th Cir. 1987) (defendant's continual refusal to retain or accept appointed counsel or expressly waive his right to counsel constituted a waiver of the right to counsel because defendant "understood the dangers and disadvantages of self-representation" and "elected to defend himself with his 'eyes open.'") (*citing Faretta*, 422 U.S. at 835); *cf. United States v. Meeks*, 987 F.2d 575, 577-79 (9th Cir. 1993) (defendant's "continual changing of attorneys" did not constitute a waiver of the right to counsel because the court controlled whether defendant had court-appointed counsel and defendant, who was mentally ill, was not aware of the dangers of self-representation).

Decisions by the Fifth, Seventh, and Tenth Circuits also characterize a defendant's manipulation of attorney hiring and appointment processes as a knowing and intelligent waiver of the right to counsel. *See, e.g., United States v. Bauer*, 956 F.2d 693, 695 (7th Cir.1992) (defendant's ability to pay for counsel combined with his refusal to do so constitutes a waiver by conduct of the right to counsel); *McQueen v. Blackburn*, 755 F.2d 1174, 1178 (5th Cir. 1985) (defendant's request on third day of trial that counsel be removed, after being warned that no replacement counsel would be appointed, was the functional equivalent of a knowing and intelligent waiver of counsel); *United States v. Mitchell*, 777 F.2d 248, 257-58 (5th Cir.1985) (defendant's knowing retainer of attorney with scheduling conflict and failure to hire a replacement within a reasonable time constitutes waiver of the right to counsel); *Richardson v. Lucas*, 741 F.2d 753, 757 (5th Cir. 1984) (defendant's refusal to proceed with appointed counsel, absent good cause and after being warned that no other counsel would be appointed, was a voluntary waiver of right to counsel); *United States v. Moore*, 706 F.2d 538, 540 (5th Cir. 1983) (defendant's persistent, unreasonable demand for dismissal of counsel and appointment of new counsel was the functional equivalent of a knowing and voluntary waiver of counsel); *United States v. Weninger*, 624 F.2d 163, 167 (10th Cir. 1980) (defendant's stubborn failure to hire an attorney constituted a waiver of the right to counsel).

C. State Court Decision Not Contrary To Established Precedent

As the cases discussed above demonstrate, there is no clearly established Supreme Court precedent prohibiting a defendant from waiving the right to counsel by conduct. Notably, *Faretta* concerned a defendant who "clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel." *Faretta*, 422 U.S. at 835. *Faretta* simply did not address whether a defendant's conduct, as opposed to a defendant's verbal request, may constitute a choice to waive the right to counsel. Because there exists no Supreme Court precedent regarding waiver of counsel by conduct alone, the state court's decision here that petitioner waived his right to counsel by failing to cooperate with his attorneys cannot be contrary to clearly established Supreme Court precedent. *See* 28 U.S.C. §2254(d)(1).

Moreover, the state court's decision here even conforms to the Supreme Court's precedent concerning explicit waivers of the right to counsel, at least to the extent that court does not apply a rule "opposite to" or "diametrically different from" that standard. *See Williams*, 529 U.S. at 388. The Supreme Court precedent dictates that in order to validly waive the right to counsel a defendant need only know the dangers of self-representation and subsequently elect to proceed without an attorney. *See Faretta*, 422 U.S. at 835. At a minimum, the record indicates that the state court

warned petitioner that he would waive his right to counsel if he could not cooperate with Mr. Bernstein, that the court believed that petitioner knew the risks of self-representation, and that the court interpreted petitioner's offensive letter to Mr. Bernstein as evidence of petitioner's election to proceed without counsel.[4] Thus, because the trial court's state trial court neither arrived at a conclusion of law opposite to the Supreme Court nor decided a case differently than the Supreme Court on a set of materially indistinguishable facts, the court did not act "contrary to . . . clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1); *see Sarausad*, 479 F.3d at 676 (*citing Williams*, 529 U.S. at 413).

D. State Court Decision Not Unreasonable Application of Established Precedent

The circuit court cases discussed above also illustrate that trial courts do not unreasonably apply Supreme Court precedent by deciding that defendants validly waive their right to counsel when they: (1) understand the dangers of self-representation; and (2) manipulate the attorney appointment process. Here, the record shows that the petitioner satisfied both of these

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[4] Although the trial court never explicitly stated the rule it applied, a state court's failure to articulate the source of the relevant legal rule does not necessarily render it's decision "contrary to" Supreme Court precedent. *See Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (*per curiam*) (a state court's decision is not contrary to clearly established federal law simply because the court did not cite or demonstrate awareness of Supreme Court opinions so long as neither the reasoning nor the result of the state-court decision contradicts them).

elements, even though the state court never specifically instructed the petitioner about the dangers of self-representation. Thus, the state court's decision to interpret the petitioner's conduct as a waiver of the right to counsel does not constitute an "unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1).

First, the record in this case reflects that the petitioner already understood the dangers of self-representation even without specific instruction from the court. In the same hearing when the court permitted Mr. Bernstein to withdraw, the petitioner stated that he was "in no way competent" to represent himself, reflecting that he grasped the complexity of self-representation. R.E. 106 at 123. Additionally, the petitioner demonstrated his understanding of the importance of counsel when he stated that the court "railroaded [him] into a conviction," by denying his request for replacement counsel and a continuance. R.E. 106 at 132. Finally, the court's comment that the petitioner "seem[ed] to communicate very well," indicated that the petitioner had the intellectual capacity to understand the risks of proceeding pro se. R.E. 104 at 6.

Moreover, "in a collateral attack on an uncounseled conviction, it is the defendant's burden to prove that he did not competently and intelligently waive his right to the assistance of counsel." *Iowa v. Tovar*, 541 U.S. 77, 92 (2004). The petitioner's unsupported

assertions that he was unaware of the dangers of self-representation do not satisfy this burden. Therefore, the trial court did not unreasonably apply the Supreme Court precedent establishing awareness of the risks of self-representation as a precondition for a valid waiver of the right to counsel.[5]

Second, the record also demonstrates that the petitioner attempted to manipulate the attorney appointment process by sabotaging his relationship with his last option for counsel, yet verbally insisted that he had not waived his right to counsel. Initially, the trial court warned the petitioner several times that the court would not appoint another attorney if the petitioner

[5] There is an argument that the state court's decision unreasonably applied Ninth Circuit law requiring that a defendant be aware of "1) the nature of the charges against him, 2) the possible penalties, and 3) the 'dangers and disadvantages of self-representation'" before waiving the right to counsel. *United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2003) (*citing United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987)). Even if the state court's decision conflicted with these Ninth Circuit requirements, this Court cannot grant petitioner habeas relief. A petitioner is entitled to habeas relief if the state court unreasonably applies "clearly established Federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). Because the Supreme Court has never clearly established precedent concerning what warnings are required before a waiver by conduct of the right to counsel, the state court could not have unreasonably apply that precedent here. Further, the Ninth Circuit's rules concerning pre-waiver warnings are extensions of the requirements established by *Faretta* specifically for explicit waivers of the right to counsel. Thus, these Ninth Circuit requirements do not necessarily clarify principles of Supreme Court law concerning waiver of the right to counsel by conduct, the situation in this case.

could not agree with Mr. Bernstein. R.E. 106 at 7, 8, 10. Subsequently, the petitioner sent two letters, one to a judge apparently criticizing Mr. Bernstein's performance, and the other to Mr. Bernstein crudely insulting Mr. Bernstein's ethnicity, profession, and competence. R.E. 106 at 108, 119. The petitioner declared, after the fact, that he had not intended for Mr. Bernstein to withdraw, yet petitioner's letter exhorting Mr. Bernstein to "do the world a favor and find another career" sent the opposite message. *See* R.E. 106 at 119, 124. Even though the trial court ultimately acceded to Mr. Bernstein's request to withdraw, it is a reasonable interpretation of the record that the petitioner, not the court, elected to terminate his relationship with Mr. Bernstein.[6] Consequently, the trial court's decision to construe the petitioner's conduct as a choice to waive the right to counsel was not an unreasonable application of Supreme Court precedent.

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[6] Mr. Bernstein potentially shares some responsibility for prematurely ending his representation of the petitioner. For example, Mr. Bernstein stated that he refused to continue representing the petitioner, regardless of whether the trial judge permitted him to withdraw. R.E. 106 at 111. Further, counsel appearing on behalf of the petitioner suggested that Mr. Bernstein brought the petitioner's privileged letter to the court's attention for self-serving purposes, apparently to hasten the end of their working relationship. *Id.* at 144. It is unnecessary for this analysis under 28 U.S.C. § 2254(d)(1), however, to evaluate whether Mr. Bernstein was responsible for forcing the trial judge to let him withdraw. Rather, it is sufficient that the record reflects that the trial judge reasonably applied the waiver standard by interpreting petitioner's own conduct (independent of Mr. Bernstein's reaction) as a choice to waive the right to counsel.

II. Forfeiture of the Right to Counsel

Unlike a waiver, which requires "an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), a forfeiture "results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish that right." *United States v. Goldberg*, 67 F.3d 1092, 1101 (3rd Cir. 1995) (discussing the meanings of the terms "waiver," "forfeiture," and "waiver by conduct" and noting the frequent confusion of these terms by a number of courts).

A. Supreme Court Precedent at the Time of the Relevant State Court Decision

Although the Supreme Court has never addressed a case involving the forfeiture of a defendant's right to counsel, the Court has decided two cases involving the forfeiture of the related Sixth Amendment right to be present at one's own trial. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970) ("a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom:); *Taylor v. United States*, 414 U.S. 17, 19-20 (1973) (defendant

"effectively waived" the right to be present at trial by voluntary absence, despite that defendant did not know and never was warned that the trial would continue in his absence).

Further, the Supreme Court grants trial courts particular deference in managing defiant defendants. In discussing a defendant's forfeiture of his constitutional right to be present at trial, the Supreme Court noted that "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

B. Federal Court's Interpretation of Supreme Court Precedent

In habeas corpus actions, the lower federal courts generally agree that *Taylor* and *Allen* do not generate clearly established Supreme Court precedent specifically concerning the forfeiture of the right to counsel. *See Wilkerson v. Klem*, 412 F.3d 449, 454 (3d Cir. 2005) ("there is no Supreme Court precedent dealing with the forfeiture of counsel"); *Fischetti v. Johnson*, 384 F.3d 140, 150 (3d Cir. 2004) ("the [Supreme] Court's established precedent in this area has not expressly dealt with the matter of forfeiture of counsel"); *Barrett v. Meeks*, No. CIV S-97-1106 LKK JFM P, 2006 U.S. Dist. LEXIS 82935 at *48 (E.D. Cal. Nov. 14, 2006), adopted by, *Barrett v. Meeks*, No. CIV S-97-1106 LKK JFM P, 2007 U.S. Dist. LEXIS 21846 (E.D. Cal. Mar. 27, 2007) ("[t]he United States Supreme Court, however, has not

specifically addressed whether a criminal defendant may forfeit or 'waive by conduct' the right to counsel"); *cf. Gilchrist v. O'Keefe*, 260 F.3d 87, 97 (2d Cir. 2001), *cert. denied, Gilchrist v. Smith*, 535 U.S. 1064 (2002) (*Taylor* and *Allen* clearly establish only the general proposition that "a defendant may be found to have forfeited certain trial-related constitutional rights based on certain types of misconduct," without specifically addressing the right to counsel). Therefore, this Court adopts the analysis that *Taylor* and *Allen* do not create precedent on the forfeiture of the right to counsel.

C. State Court Decision Not Contrary To Established Precedent

The record here indicates that the trial court potentially applied a forfeiture standard in denying petitioner's motions to appoint counsel. The court's statement, "having read that [offensive] letter, I decided it was fruitless to try and appoint another attorney to represent you," suggests forfeiture. R.E. 106 at 119. By identifying the offensive letter itself as an act of misconduct that justified its decision, the court apparently reasoned that the petitioner forfeited his right to representation, irrespective of his actual wishes. Further, in a hearing immediately before the beginning of the petitioner's trial, the state court indicated that two Oregon state cases, *Spry* and *Brenner*, suggested that the right to counsel does not require a judge to repeatedly give a defendant an additional court-appointed attorney. R.E. 106 at 148. These cases endorse forfeiture by noting that defendants may lose

their right to counsel absent a waiver. *See State v. Spry*, 166 Ore. App. 26, 29 (Or. Ct. App. 2000) (""This is not a case, however, where the defendant has waived his rights.'") (*quoting State v. Lingren*, 79 Ore. App. 324, 327, 719 (Or. Ct. App. 1986)); *State v. Brenner*, 151 Ore. App. 159, 167 (Or. Ct. App. 1997) ("[D]efendant's argument that he did not validly waive his right to counsel misses the point.")

Even if the state court applied a forfeiture standard, the state court did not act contrary to clearly established Supreme Court precedent governing the forfeiture of the right to counsel because no such precedent exists. *See Fischetti v. Johnson*, 384 F.3d 140, 150 (3d Cir. 2004) (state court ruling not contrary to clearly established Federal law because the Supreme Court has not "expressly dealt with the matter of forfeiture of counsel"); *Barrett v. Meeks*, 2006 U.S. Dist. LEXIS 82935 at *48-49 (E.D. Cal. Nov.14, 2006), adopted by, *Barrett v. Meeks*, 2007 U.S. Dist. LEXIS 21846 (E.D. Cal. Mar. 27, 2007) (state court decision cannot be contrary to federal law as determined by Supreme Court precedent because the Supreme Court has not specifically addressed whether a criminal defendant may forfeit or waive by conduct the right to counsel).

D. State Court Decision Not Unreasonable Application of Established Precedent

Circuit courts recognize that defendants who verbally abuse, threaten, or physically attack an attorney

may forfeit their right to counsel. *See United States v. McLeod*, 53 F.3d 322, 325-26 (11th Cir. 1995) (relying on *Illinois v. Allen*, 397 U.S. 337 (1970) and holding that a defendant forfeited his right to counsel when he verbally abused and threatened to harm his attorney during a telephone call, threatened to sue his attorney four times, and urged his attorney to engage in unethical conduct); *United States v. Leggett*, 162 F.3d 237, 250 (3d Cir. 1998) ("an attack qualifies as the sort of 'extremely serious misconduct' that amounts to the forfeiture of the right to counsel").

Moreover, in habeas corpus cases, state courts do not unreasonably apply Supreme Court precedent when deciding that defendants forfeit their right to counsel by failing to secure or accept counsel, or by physically assaulting their attorney. *See Wilkerson v. Klem*, 412 F.3d 449, 455-56 (3rd Cir. 2005) (state court's decision that defendant forfeited right to counsel by failing to retain an attorney by trial date was not an unreasonable application of Supreme Court precedent); *Fischetti v. Johnson*, 384 F.3d 140, 152 (3rd Cir. 2004) (state court's decision that defendant forfeited right to counsel by refusing to continue with current court-appointed counsel or represent himself was not an unreasonable application of Supreme Court precedent); *Gilchrist v. O'Keefe*, 260 F.3d 87, 97 (2nd Cir. 2001), *cert. denied*, *Gilchrist v. Smith*, 535 U.S. 1064 (2002) ("given the Supreme Court's recognition that other important constitutional rights may be forfeited based on serious misconduct, we cannot say that the state courts were

unreasonable in determining that the right to counsel can be forfeited based on petitioner's physical assault on his attorney").

Here, the petitioner neither physically assaulted his attorney nor explicitly refused court-appointed counsel as in other cases where courts found clear forfeitures of the right to counsel. Nevertheless, the petitioner's letter contained profanity, ethnic slurs, and other offensive language directed specifically toward Mr. Bernstein. R.E. 106 at 119. The court found this conduct sufficiently abusive to terminate petitioner's right to counsel. *Id.* Even if the state court erroneously interpreted the petitioner's letter as a forfeiture of the right to counsel, the court's decision was not "objectively unreasonable."

III. Request for Continuance

A. Supreme Court Precedent at the Time of the Relevant State Court Decision

The Supreme Court has also clearly established the related but separate principle that a trial court may deny a defendant's request for continuance to expedite judicial process when the defendant fails to secure counsel, even when that denial results in the defendant's being unrepresented at trial. *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). In *Ungar*, a trial witness was charged with contempt of court for refusing to answer questions. *Id.* at 576-80. When the witness appeared at the contempt hearing with a lawyer who was not

available immediately to represent him, the judge refused to adjourn the hearing because the witness had sufficient time to hire an attorney who would be available to proceed immediately. *Id.* at 590. The witness was later convicted. *Id.* at 576. The witness appealed, the New York Court of Appeals affirmed his conviction, and the witness challenged that decision. *Id.* The Supreme Court affirmed, holding that the judge's decision not to grant an adjournment did not deny the witness due process. *Id.* at 590. The Court reasoned that "[t]he five days' notice given petitioner was not a constitutionally inadequate time [for the petitioner] to hire counsel and prepare a defense." *Id.* The Court also declared that the "the motion for continuance was not made until the day of the scheduled hearing" and that "[the petitioner] himself was a lawyer familiar with the court's practice of not granting adjournments." *Id.* Consequently, the Supreme Court's clearly established precedent in *Ungar* grants the trial court discretion to deny continuances of unrepresented defendants when the defendant's own conduct causes the undesirable delay. *See Id.* at 589-90.

B. Federal Courts' Interpretation of Supreme Court Precedent

Ninth Circuit cases analyzing this same issue reinforce the holding of *Ungar* regarding the trial court's discretion to deny continuances that force defendants to appear without counsel. In *United States v. Leavitt*, 608 F.2d 1290 (9th Cir. 1979), the petitioner waited four months after being warned of the need to obtain counsel before contacting the public defender. *Id.* at 1293. Three

days later, at the trial date, the trial court allowed the petitioner's public defender to withdraw because the attorney was not adequately prepared. *Id.* at 1293. The trial court, however, denied the petitioner's request for a continuance, forcing the petitioner to proceed through the government's presentation of evidence without counsel. *Id.* at 1293. At the end of the prosecution case, the judge continued the trial to allow the petitioner to prepare his case with the public defender, who had reentered his case as counsel. *Id.* at 1293. The petitioner did not call any witnesses or recall any government witnesses, and was convicted. *Id.* The petitioner appealed, and the Ninth Circuit affirmed the petitioner's conviction. *Id.* at 1294. The court held that "in some circumstances a court may constitutionally deny a continuance even when that denial results in the defendant's being unrepresented at trial . . . when the defendant engages in a course of conduct which is dilatory and hinders the efficient administration of justice." *Id.* at 1293 (*citing Ungar*, 376 U.S. at 589).

Similarly, in *Kelm*, the trial court denied petitioner's request for appointed counsel and a continuance after the petitioner continually refused to retain or accept appointed counsel or expressly waive his right to counsel in an attempt to delay trial. *United States v. Kelm*, 827 F.2d 1319, 1321 (9th Cir. 1987). The Ninth Circuit affirmed, holding that the district court's decision not to grant further continuances was "fair and reasonable." *Id.* The court noted that trial was continued three previous times for the petitioner to find suitable

counsel, and that the petitioner's requirements that prospective counsel complete a detailed questionnaire and be experienced tax trial lawyers "deterred and hindered counsel selection." *Id.* Thus, the Ninth Circuit's decisions in *Leavitt* and *Kelm* support the proposition that clearly established Supreme Court precedent permits trial courts to deny continuances when the defendant's own conduct in failing to secure counsel threatens to delay trial.

C. State Court Decision Not Contrary To Established Precedent

The state court's decision to deny the petitioner's motion for a continuance on the day of trial was not contrary to clearly established Supreme Court precedent. The Supreme Court has established that there is no mechanical tests for deciding when a denial of a continuance is improper. *Ungar*, 376 U.S at 589. Rather, "[t]he answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Id.* Here, the trial court explicitly based its decision to deny petitioner's continuance on several relevant case-specific factors. The trial court noted the unavailability of potential replacement counsel (Ms. Cooke), the postponement of trial well beyond the limit set by the Oregon Supreme Court's timeliness guidelines, and the petitioner's repeated threats to delay the case indefinitely. R.E. 106 at 132. Thus, the trial court's decision was consistent with the Supreme Court's

clearly established precedent in Ungar governing a trial court's discretion to deny continuances.

D. State Court Decision Not Unreasonable Application of Established Precedent

The trial court's decision to deny petitioner's request for a continuance also was not an unreasonable application of Supreme Court precedent governing the denial of continuances. *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). The Ninth Circuit has interpreted *Ungar* to hold that trial judges can deny continuances resulting in defendants proceeding to trial unrepresented if the defendant's own dilatory course of conduct in failing to secure counsel hinders the efficient administration of justice. *See Kelm*, 827 F.2d at 1322; *Leavitt*, 608 F.2d at 1293. Here, as in *Leavitt* and *Kelm*, petitioner exhibited a dilatory course of conduct that delayed the onset of trial. For example, the state court determined that "a fair reading of the file here, and certainly the last encounter I had with [the petitioner] . . . suggests that [the petitioner] has a calculated purpose in delaying this indefinitely." R.E. 106 at 148.

The petitioner's conduct was even more dilatory than that of the defendants in *Leavitt* and *Kelm*. Instead of merely failing to seek counsel, as in *Leavitt*, or refusing to accept counsel, as in *Kelm*, the petitioner retained one attorney and accepted four other court-appointed attorneys, but gradually undermined his relationships with each of these attorneys until they withdrew. This dilatory conduct secured petitioner six

new trial dates and delayed trial approximately 320 days beyond the trial deadline set by the Oregon Supreme Court for such cases. R.E. 106 at 126. By contrast, the Ninth Circuit upheld the trial court's denial of a continuance in *Kelm* when the defendant had received just three previous continuances and delayed trial only three months. *See Kelm*, 827 F.3d at 1320-21. Similarly, the Ninth Circuit upheld the trial court's denial of a continuance in *Leavitt* when the defendant had received only one previous continuance that delayed trial less than two weeks. *See Leavitt*, 608 F.2d at 1293. Since petitioner's conduct was at least as dilatory as that of defendants in *Kelm* and *Leavitt* where the Ninth Circuit upheld denial of continuances, the trial court's decision to deny petitioner's day-of-trial request for a continuance was a reasonable application of clearly established Supreme Court precedent as interpreted by the Ninth Circuit.[7]

[7] The petitioner does not explicitly argue that the trial court acted contrary to, or unreasonably applied Federal law in denying him a continuance to obtain counsel before sentencing. Such an argument might succeed in the habeas context, given that, as petitioner noted in his direct appeal, the "imminent trial date could have no longer been a concern to the trial court . . . ." R.E. 108 at 22. Unfortunately, neither party's exhibits include a transcript of petitioner's sentencing, and thus it is impossible for this Court to analyze whether the petitioner is entitled to habeas relief based on the trial court's failure to grant a continuance for sentencing.

IV. Failure to Inquire Into Counsel's Motion to Withdraw

Petitioner also briefly argues that the trial court improperly granted Mr. Bernstein's motion to withdraw because it did not conduct an inquiry into the basis for that motion. In relation to a defendant's motion for new counsel, the Sixth Amendment requires "on the record an appropriate inquiry into the grounds for such a motion, and that the matter be resolved on the merits before the case goes forward." *Schell v. Witek*, 218 F.3d 1017, 1025 (9th Cir. 2000) (*citing Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991)). Here, the petitioner suggests that the rule articulated in *Schell* in the context of a defendant's motion for new counsel should also apply to an attorney's motion to withdraw. Even if the court were to extend that principle here, the record shows that the state trial court performed such an inquiry into the grounds for Mr. Bernstein's motion by: (1) examining the offensive letter that the petitioner sent to Mr. Bernstein; (2) hearing from the petitioner and Mr. Bernstein; and (3) reviewing the petitioner's history with previous attorneys, including the court's warning that Mr. Bernstein would be the petitioner's last court-appointed attorney. R.E. 106 at 114-26. Thus, the state court did not act contrary to or unreasonably apply established Supreme Court precedent governing inquiry into motions for new counsel.

V. Alternative Request for Evidentiary Hearing

The petitioner alternatively requests an evidentiary hearing. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a district court presented with a request for an evidentiary hearing must:

> "determine whether a factual basis exists in the record to support the petitioner's claim. If it does not, and an evidentiary hearing might be appropriate, the court's first task in determining whether to grant an evidentiary hearing is to ascertain whether the petitioner has 'failed to develop the factual basis of a claim in State court.' If so, the court must deny a hearing unless the applicant establishes one of the two narrow exceptions set forth in section 2254(e)(2)(A) & (B). If, on the other hand, the applicant has not 'failed to develop' the facts in state court, the district court may proceed to consider whether a hearing is appropriate, or required under [*Townsend v. Sain*, 372 U.S. 293, 9 L. Ed. 2d 770, 83 S. Ct. 745 (1963)]."

Insyxiengmay v. Morgan, 403 F.3d 657, 669-670 (9th Cir. 2005) (*quoting Baja v. Ducharme*, 187 F.3d 1075,

1078 (9th Cir. 1999)). Under *Townsend*, a defendant is entitled to an evidentiary hearing if he can show that:

> "(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is asubstantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing."

Earp v. Ornoski, 431 F.3d 1158, 1167 (9th Cir. 2005) (*quoting Townsend*, 372 U.S. at 313), *cert. denied*, *Ornoski v. Earp*, 547 U.S. 1159 (2006).

A federal district court also retains a degree of discretion in determining whether to hold an evidentiary hearing. *Lonchar v. Thomas*, 517 U.S. 314, 326 (1996) (*citing* Habeas Corpus Rule 8(a); *Townsend*, 372 U.S. at 318; *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12, (1992)). In particular, "where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew." *Townsend*, 372 U.S. at 312 (1963).

Here, petitioner does not demonstrate the he is entitled to an evidentiary hearing. Petitioner has not failed to develop the factual basis of a habeas claim in state court. *See Insyxiengmay*, 403 F.3d at 669-670. Further, the petitioner does not demonstrate that any of the six situations described in *Townsend* apply. *See Earp*, 431 F.3d at 1167. Nor does the petitioner allege any facts which, if proved, could entitle him to habeas relief.[8] *See Townsend*, 372 U.S. at 312. Thus, the Court should not grant petitioner's request for an evidentiary hearing.

RECOMMENDATION

For the reasons set forth above, the Petition for Writ of Habeas Corpus (#1) and Alternative Request for Evidentiary Hearing (#21) should be DENIED, and judgment should be entered DISMISSING this case with prejudice.

[8] Petitioner's assertion that he was unaware of the risks of self-representation might arguably be such a fact which, if proved, could entitle him to habeas relief. Even in the unlikely event that petitioner proved that fact in an evidentiary hearing, the record still shows that the state trial court could have reasonably concluded from petitioner's words and conduct that the petitioner knew of the dangers of self-representation. Thus, the highly deferential habeas standard would not entitle the petitioner to relief merely because the trial court was mistaken about petitioner's level of awareness. *See Williams*, 529 U.S. at 410 (the "unreasonable application" test requires that the state court decision be more than just incorrect or erroneous).

SCHEDULING ORDER

Objections to these Findings and Recommendation, if any, are due September 2, 2008. If no objections are filed, then the Findings and Recommendation will be referred to a Unites States District Judge for review and go under advisement on that date. If objections are filed, any response to the objections will be due fourteen days after the date the objections are filed and review of the Findings and Recommendation will go under advisement on that date.

DATED this 18th day of August, 2008.

/s/ Paul Papak
Honorable Paul Papak
United States Magistrate Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DAVID GEORGE CHANDLER, Petitioner, v. SHARON BLACKLETTER, Respondent.	Civil No. 06-1777-PK ORDER

HAGGERTY, Chief Judge:

Magistrate Judge Papak issued a Findings and Recommendation [30] in this action that recommended that petitioner's Petition for Writ of Habeas Corpus [1] and Alternative Request for Evidentiary Hearing [21] be denied. Petitioner filed timely objections to the Findings and Recommendation, and counsel for respondent waived the opportunity to file a substantive brief in reply. The matter was then referred to this court. When a party objects to any portion of the Magistrate's Findings and Recommendation, the district court must conduct a de novo review of that portion of the Magistrate's report. 28 U.S.C. § 636(b)(1)(B);

McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981).

The court has given the file of this case a *de novo* review, and has also carefully evaluated the Findings and Recommendation, petitioner's objections, and the entire Record. Magistrate Judge Papak provided a sound, thorough analysis of the facts and circumstances presented, and this analysis need be only summarized here.

Petitioner's pled not guilty in Clackamas County to one count of Rape in the Second Degree, two counts of Sodomy in the Second Degree, one count of Furnishing Alcohol to a Person under 21 Years of Age, and one count of Endangering the Welfare of a Minor. Subsequently, petitioner caused extensive pretrial delays of over 400 days by engaging in obstreperous conduct that poisoned his relationship with a series of attorneys who were retained or appointed to represent him in his defense to the prosecution. This conduct deserves careful scrutiny because the petitioner made explicit threats in correspondence to the prosecution in which he made "it perfectly clear that [petitioner] will drag this on in any way that he can." Respondent's Exhibit (RE) 104 at 5. The prosecutor explained that the petitioner "intentionally threatened that if he didn't get a plea offer that he liked that he would drag this case out indefinitely and knew how to do it." *Id.* at 4. By the time of trial, seven defense attorneys had been involved with

attempting to defend petitioner. Petitioner had rejected or acted belligerently to most or all of these attorneys.

During the delays caused by petitioner's failure to cooperate with counsel, the presiding trial judge warned that if petitioner continued to reject counsel, he would be compelled to proceed to trial without counsel. *See* RE 106 at 7 (court advised petitioner that "this is the end of the line with regard to changing attorneys"); *id.* at 8 (court instructed petitioner that "if you're not able to get along with your next lawyer, you're going to be in here trying this case by yourself"); *id.* at 10 (court reiterated that petitioner had received his "last opportunity to change attorneys" and that if the petitioner was "not able to agree with his new attorney" he would be compelled to proceed to trial without an attorney).

Shortly after petitioner's seventh attorney was appointed, petitioner submitted a letter to the attorney that directed obscene and ethnic slurs at the counsel and requested, in part, that he find "another career." RE 106 at 119. This conduct compelled the court to allow the attorney to withdraw, and to attempt to appoint a legal advisor to assist with petitioner's self-representation. *Id.*

Petitioner responded (in an apparently unconvincing manner) that he was content to have the attorney remain as counsel. He also opined that he was "in no way competent" to represent himself. *Id.* at 121-23. The court noted that petitioner's pretrial delay had exceeded 400 days (and that guidelines from the Oregon Supreme Court set out that the felonies for which

petitioner was charged should be prosecuted in ninety days), and that petitioner had threatened explicitly to engage in delay if he was not presented with a favorable plea offer. The court denied petitioner's request for a further continuance and an appointment of counsel. *Id.* at 126-32. Instead, the court advised petitioner that a search for a legal advisor would be undertaken. *Id.*

Shortly thereafter, the court offered to appoint a legal advisor if petitioner agreed to a new trial date. Petitioner refused. RE 106 at 134-36.

On December 17, 2002, the day of trial, an attorney appeared on petitioner's behalf and requested an appointment of counsel. The court reviewed petitioner's "calculated" threat to delay the trial and denied the request on grounds that Oregon law did not require a trial court to continue to provide appointed counsel repeatedly, and on grounds that the court believed that petitioner understood the consequences of failing to cooperate with his last appointed counsel. *Id.* at 147-48.

Petitioner was convicted on all counts. RE 106 at 310-11. Petitioner appeared for sentencing without counsel and was sentenced to three consecutive terms of seventy-five months, for a total of 225 months' incarceration. RE 101, 106 at 322.

Petitioner appealed, assigning error to the trial court's refusal to grant his request for a continuance, the

court's refusal to appoint counsel for the trial, and the court's failure to appoint counsel for sentencing. RE 108 at 15, 21. The Oregon Court of Appeals affirmed without opinion and the Oregon Supreme Court denied a petition for review. *State v. Chandler*, 135 P.3d 859 (Or. App. 2006); *State v. Chandler*, 142 P.3d 73 (Or. 2006).

After petitioner advanced his Petition for Writ of Habeas Corpus, Magistrate Judge Papak issued a Findings and Recommendation concluding that because the "state trial court neither arrived at a conclusion of law opposite to the Supreme Court nor decided a case differently than the Supreme Court on a set of materially indistinguishable facts, the court did not act contrary to clearly established Federal law as determined by the Supreme Court of the United States." Findings and Recommendation at 17 (internal quotation and citations omitted). The Findings and Recommendation concluded that the petition must be denied. *Id.*

Moreover, the Findings and Recommendation found that "the trial court did not unreasonably apply the Supreme Court precedent establishing awareness of the risks of self-representation as a precondition for a valid waiver of the right to counsel," primarily "[b]ecause the Supreme Court has never clearly established precedent concerning what warnings are required before a waiver by conduct of the right to counsel, [and therefore] the state court could not have unreasonably [applied] that

precedent here." Findings and Recommendation at 18; 18 n.5.

Alternatively, the Findings and Recommendation reviewed the law regarding "forfeiture" of a defendant's right to counsel. Findings and Recommendation at 20-21. The Findings and Recommendation concluded that "[e]ven if the state court applied a forfeiture standard, the state court did not act contrary to clearly established Supreme Court precedent governing the forfeiture of the right to counsel because no such precedent exists." Findings and Recommendation at 22 (citation omitted).

The Findings and Recommendation also concluded that "the trial court's decision [to deny petitioner's motion for a continuance] was consistent with the Supreme Court's clearly established precedent . . . governing a trial court's discretion to deny continuances." Findings and Recommendation at 26.

Finally, the Findings and Recommendation concluded that petitioner failed to demonstrate that he is entitled to an evidentiary hearing. Findings and Recommendation at 29-30.

OBJECTIONS

Petitioner's objections to the Findings and Recommendation itself assert primarily that "the state-court decision in this case was both 'contrary to' and 'an unreasonable application of' United States Supreme

Court precedent.'" Objections at 2. Secondarily, petitioner renews arguments that he presented in briefing before the Magistrate Judge. Objections at 4-8. Petitioner's objections are rejected.

1. The Findings and Recommendation did not err in concluding that the state court decision was not "contrary to" or an "unreasonable application of" Supreme Court precedent.

The standards for determining whether the petition presented is meritorious were presented correctly by the Findings and Recommendation. Magistrate Judge Papak acknowledged that:

> A habeas petitioner is not entitled to relief in federal court unless he demonstrates that the state court's adjudication of his claim:
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of

> the evidence presented in the State court proceeding. 28 U.S.C. § 2254(d).

Findings and Recommendation at 7-8.

A state court's findings of fact are presumed correct and the petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Federal courts apply a "highly deferential standard for evaluating state-court rulings." *Sarausad v. Porter*, 479 F.3d 671, 676 (9th Cir. 2007) (internal citations omitted).

The Findings and Recommendation recognized that section 2254(d)(1) "establishes a two-part test to determine whether a habeas petitioner is entitled to relief." Findings and Recommendation at 8 (*citing Sarausad*, 479 F.3d at 676).

First, the petitioner bears the burden of establishing that there is clearly established Supreme Court precedent. *Id.* (citation omitted).

Second, the petitioner must show that the state court decision was either "contrary to" or an "unreasonable application" of that precedent. *Id.* (citation omitted).

As noted, the Findings and Recommendation concluded that – at least at the time of the state court's

decisions – there was no clearly established Supreme Court precedent regarding the scope of warnings that a court must provide before permitting a waiver of the constitutional right to counsel. Findings and Recommendation at 12-13 (noting that although the Supreme Court has issued an opinion that "clarified the types of warnings required before" a waiver can be construed as valid, this ruling was issued two years after the state court decision at issue here (*citing Iowa v. Tovar*, 541 U.S. 77, 81 (2004)).

The most applicable decision that could be construed as clearly established Supreme Court precedent is the Court's decision in *Faretta v. California*, 422 U.S. 806 (1975). The Court in *Faretta* held that a waiver of counsel is valid whenever the record establishes that the defendant "knows what he is doing and his choice is made with his eyes open." *Id.* at 835 (citation and internal quotation omitted). There is no dispute that the preferred procedure for ensuring that the *Faretta* standard is satisfied is by engaging in a colloquy with a defendant in open court to confirm that the defendant understands the nature of the charges being prosecuted, the possible penalties, and the dangers and disadvantages of self-representation. *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987).

There is also no dispute that such a colloquy never occurred between the trial judge and petitioner in this case. However, as the Findings and Recommendation acknowledged, in some "rare

instances" (at least prior to the *Tovar* opinion), a knowing and intelligent waiver is possible regardless of whether a colloquy has occurred. Findings and Recommendation at 14 (*citing Savage v. Estelle*, 924 F.2d 1459, 1466 (9th Cir. 1990) (quotation omitted). As the Ninth Circuit recognized in *Balough*, there are limited exceptions precluding automatic reversal on grounds that the trial court failed to discuss *Faretta* elements, such as "when the record as a whole reveals a knowing and intelligent waiver." 820 F.2d at 1488. In such cases, the constitutionality of the imputed waiver is evaluated in terms of what the defendant understood rather than what the court may have stated. *Id.* at 1487-88.

The Findings and Recommendation concluded correctly that this case fell within this exception. The record establishes that petitioner represented to the prosecutor that he did not trust attorneys and that he was capable of speaking for himself. RE 104 at 5. Petitioner later acknowledged that he understood that if he caused the termination of the relationship between him and his last appointed attorney, he would proceed to trial without counsel. RE 106 at 8. Later, petitioner apparently re-evaluated his own abilities and asserted that he was "in no way competent" to represent himself at trial. RE 106 at 123.

This acknowledgment of the risks inherent in proceeding to trial without representation was made

after petitioner disclosed his willingness to delay his prosecution indefinitely and after he conveyed to the trial judge that he understood that he would have to represent himself if he disrupted the relationship with his final court-appointed counsel. In sum, this record establishes that petitioner: (1) willfully destroyed the relationship existing between him and the seventh attorney involved in his defense; (2) understood that by so doing he would be asked to proceed to trial without counsel; (3) recognized the challenges and risks inherent in self-representation, and (4) refused to cooperate in any way to assist the court in obtaining a legal advisor for him. Under these facts, the state court correctly deemed petitioner to have waived his right to counsel in a knowing and intelligent manner. This conclusion was neither "contrary to," nor an "unreasonable application" of, any applicable Supreme Court precedent.

Moreover, petitioner has not met the burden of establishing that there is any clearly established Supreme Court precedent that was violated by the state court's rulings. Accordingly, this court need not entertain petitioner's challenges to whether the Findings and Recommendation erred in its comprehensive analysis that, alternatively, petitioner may be construed to have forfeited his right to counsel.

2. **The Findings and Recommendation did not err in its conclusions regarding petitioner's other arguments.**

Next, petitioner renews his challenges that he

asserted before the Magistrate Judge regarding whether he knowingly and intelligently waived his right to counsel. For many of the same reasons provided above, this court concludes that petitioner committed a knowing and intelligent waiver.

As petitioner asserts, the government bears the burden to show that a waiver of this right was valid. *United States v. Ant*, 882 F.2d 1389, 1394 (9th Cir. 1989). The government has done so. Despite petitioner's arguments to the contrary, it was petitioner and not the trial judge who exercised control over whether petitioner continued to have counsel represent him. *See* Objections at 6. As reviewed above, petitioner understood the consequences awaiting him if he destroyed the relationship between him and his final counsel. He also expressed a confidence in speaking for himself, and then – after agreeing that if he failed to cooperate with his final attorney he would represent himself – he tacitly acknowledged the challenges of self-representation by expressing doubt concerning his chances for success in the situation he created. This situation was one that he threatened to cause unless the prosecution offered him a favorable deal. Under these unusual circumstances, petitioner's game-playing was construed correctly as a knowing and intentional waiver of his right to counsel. *See United States v. Kelm*, 827 F.2d 1319, 1322 (9th Cir. 1987) (the defendant's continued refusal either to retain counsel or to accept appointed counsel constituted a

waiver of the right to counsel, especially in light of the fact that the defendant controlled whether he had counsel, and then chose not to retain counsel to frustrate the judicial process). Although petitioner reasserts that Supreme Court precedent (*Tovar*) now requires a trial court to discuss the risks of self-representation explicitly with a defendant, the state court's decision in this case was not contrary to Supreme Court precedent at the time the decision was made.

3. **The Findings and Recommendation is adopted.**

This court has reviewed the remainder of the Findings and Recommendation and petitioner's objections. The Findings and Recommendation is sound and entitled to adoption. Specifically, the state court's decision to deny petitioner's request for a further continuance was fair and reasonable. *See Kelm*, 827 F.2d at 1322 (when a defendant persistently refuses to accept an appointed attorney, retain an attorney, or to expressly waive the right to an attorney, a trial court's decision not to grant further continuances is fair and reasonable).

Similarly, the Findings and Recommendation correctly evaluated petitioner's alternative request for an evidentiary hearing. The Supreme Court has set forth the six elements that a petitioner must meet to establish entitlement to an evidentiary hearing. *See Townsend v. Sain*, 372 U.S. 293, 313 (1963) (an evidentiary hearing is

warranted if (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing). None of these elements is met.

CONCLUSION

Petitioner's objections have been scrutinized, and this court has undertaken a de novo review of the Findings and Recommendation at issue. The Objections [31] are overruled. The Findings and Recommendation [30] is sound and persuasive, and is adopted in its entirety. Petitioner's Petition for Writ of Habeas Corpus [1] and Alternative Request for Evidentiary Hearing [21] are denied.

IT IS SO ORDERED.

DATED this 10 day of November, 2008.

/s/ Ancer L. Haggerty

Ancer L. Haggerty
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

DAVID GEORGE CHANDLER,

Plaintiff,

Civil No. 06-1777-PK

v.

JUDGMENT

SHARON BLACKLETTER,

Defendant.

Based on the Order adopting the Magistrate's Findings and Recommendation,

IT IS ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus [1] and Alternative Request for Evidentiary Hearing [21] are DENIED. This case is DISMISSED with prejudice.

Dated this 12 day of November, 2008.

/s/ Ancer L. Haggerty

ANCER L. HAGGERTY
UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED
FEB 24, 2010
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID GEORGE CHANDLER, Petitioner-Appellant, v. SHARON BLACKETTER, Respondent-Appellee.	No. 09-35019 D.C. No. 3:06-cv-01777-PK MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ancer L. Haggerty, Senior District Judge, Presiding

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Submitted February 1, 2010**
Seattle, Washington

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: RYMER, GOULD and BYBEE, Circuit Judges.

Petitioner David George Chandler ("Chandler") seeks habeas corpus relief from his conviction in Oregon state court. We review the district court's denial of habeas relief *de novo*. *Bribiesca v. Galaza*, 215 F.3d 1015, 1018 (9th Cir. 2000). Chandler carries the burden of proving by a preponderance of the evidence that he is entitled to habeas relief, *Silva v. Woodford*, 279 F.3d 825, 835 (9th Cir. 2002), and is only entitled to such relief if the state court decision he challenges was "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Since Chandler has failed to identify any clearly established federal law, as determined by the Supreme Court, holding that a defendant's Sixth Amendment right to counsel cannot be forfeited through particularly egregious conduct, the district court properly denied his application.

Although the Supreme Court has never directly held that the right to counsel can be forfeited, the Court

has also never held to the contrary, and has held that another fundamental Sixth Amendment right—the right to be present at one's own trial—can be forfeited through misconduct. *See Taylor v. United States*, 414 U.S. 17, 19-20 (1973) (*per curiam*); *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970). Between Chandler's progression of court-appointed attorneys—all of whom were apparently discharged due to Chandler's machinations and Chandler's own boast that he "kn[e]w of many ways to drag this on indefinitely, and . . . w[ould] not hesitate to do so" in a letter to the prosecutor, there was ample evidence indicating that Chandler, like the defendant in *Allen*, was engaging in "conduct . . . to avoid being tried on the charges brought against him." *Allen*, 397 U.S. at 346.

Most importantly, Chandler has failed to identify—and we cannot find—any Supreme Court case clearly establishing that the right to counsel cannot be forfeited through a defendant's misconduct. *See* 28 U.S.C. § 2254(d)(1); *Crater v. Galaza*, 491 F.3d 1119, 1123 (9th Cir. 2007) ("[I]f habeas relief depends upon the resolution of an 'open question in [Supreme Court] jurisprudence,' § 2254(d)(1) precludes relief." (quoting *Carey v. Musladin*, 549 U.S. 70, 76 (2006)).

AFFIRMED.

APPENDIX E

FILED
APR 12, 2010
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID GEORGE CHANDLER, Petitioner, v. SHARON BLACKETTER, Respondent.	No. 09-35019 D.C. NO. 3:06-cv-01777-PK District of Oregon, Portland ORDER

Before: RYMER, GOULD and BYBEE, Circuit Judges.

The panel judges have voted to deny appellant's petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing en banc, filed March 5, 2010, is DENIED.